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ARIZONA ATTORNEY GENERAL**

August 5, 1954
Letter Opinion
No. 54-204-L

Mr. J. Morris Richards, Chairman
Arizona Development Board
Box 151
Winslow, Arizona

Re: The employment of a manager by the
Arizona Development Board

Dear Mr. Richards:

This will acknowledge receipt of your request of August 3, 1954 posing the question of whether the person appointed "manager" by the Arizona Development Board will become a public officer by virtue of such position or merely an employee of the state.

In answer to your question it is the opinion of the Department of Law that the manager appointed by the Board pursuant to the provisions of Section 2 of Chapter 113, Laws 1954, will be an employee of the state and will not be a public officer. Section 2, supra, providing for the appointment of a manager states in part as follows:

"* * *Members of the board shall select one of themselves its chairman for such term as they determine, and may appoint from within or without their membership such other officers, except a secretary, and for such terms as they deem necessary or desirable. The board shall employ, fix the salary at not to exceed seven thousand two hundred dollars per annum, and prescribe the duties of a full-time manager who shall not be one of its members, who shall be qualified by successful experience in publicity, advertising and industry promotion work for the responsibilities of the office, who shall act as ex officio secretary of the board, and who shall serve at the pleasure of the board. No man who has held an elective state or county political office in the five-year period prior to his selection as manager, including the legislature, shall be employed as such manager." (Emphasis Supplied)

We find as authority for our opinion the case of Stapleton v. Frohmler (1938) 53 Ariz. 11, 85 P. 2d 49.

Although this case involves facts which are not entirely similar to our instant fact situation we believe its principles may be extended so as to afford our solution. This case asked whether a person appointed as the executive director of the Arizona Unemployment Compensation was a public officer or a public employee. The office of executive director was created solely by action of the commission rather than by the legislature and was occupied by a person who was not a qualified elector of this state. Three elements requisite to a position of employment being a public office were outlined by the court:

- (a) The specific position must be created by law.
- (b) There must be certain definite duties imposed by law on the incumbent.
- (c) They must involve the exercise of some sovereign power.

It was the decision of the court that the executive director was an employee only, for the character of that position failed to fall within the purview of any of the foregoing elements. The court concluded as follows:

"After considering the matter fully, we are of the opinion that an 'office,' as distinct from an 'employment,' may be created only by the legislative branch of the government, either directly or by necessary implication, for such branch alone has the authority to make 'law,' and that any position which is established by the administrative department cannot be considered as an office within the meaning of the Constitution, but rather as a mere employment. If, from the law, there can reasonably be gathered the conclusion that the legislature intended to establish a definite office with definite duties and powers, the language used is immaterial, but we think that an act which merely confers the power in an executive board or commission to appoint and to fix the compensation and duties of such assistants as it finds necessary to carry out the duties imposed upon it is far from creating any office whatever.* * *"

Mr. J. Morris Richards, Chairman
Arizona Development Board

August 5, 1954
Page Three

The holding in the Stapleton case was in line with a previous opinion by our Supreme Court rendered in the case of WINDSOR v. HUNT, (1926) 29 Ariz. 504, 243 Pac. 407. This prior case adopted the three elements of a public office set forth above, with particular stress laid upon the exercise of some portion of the sovereign power by the incumbent.

In applying those elements to the instant situation it is seen that the Arizona Development Board is directed by the legislature to employ a manager. The amount of compensation paid to the manager is to be set by the Board within a maximum limit. The specific duties of the manager are not set out in the statute but are to be prescribed by the Board. The nature of the duties of the manager will be in the exercise of the will of the Board in the manner of an agent for the board. Our review of Section 2, supra, reveals that there are no definite duties imposed by law on the manager and that consequently there is no delegation of a portion of the sovereign power to the position of manager.

It is noted that Section 2, supra, appoints the manager as ex officio secretary of the Arizona Development Board. The manager does not acquire membership in the Board by virtue of being the secretary of the Board, and so does not have the power to vote as a member. The position of ex officio secretary of the Board then does not elevate the manager's position to one of public office.

Therefore, we conclude that a person appointed to the position of manager by the Arizona Development Board will be occupying that position as an employee of the state and not as an officer of the state.

We hope that this will serve to adequately answer your question.

Yours very truly,

WILLIAM PENN
Assistant to
The Attorney General

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